Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 76.

THE CLIPPER MINING COMPANY, PLAINTIFF IN ERROR,

vs.

THE ELI MINING AND LAND COMPANY, A. D. SEARL, F. C. SCHROEDER, A. T. BRITTON, AND H. J. GRAY.

BRIEF FOR DEFENDANTS IN ERROR.

STATEMENT.

This is an adverse claim suit brought by defendants in error under section 2326, United States Revised Statutes, "to determine the question of the right of possession" to certain mining ground at Leadville, Colorado. The case was tried without a jury, resulting in findings and judgment in favor of defendants in error (R., 14), and affirmance of such judgment by the supreme court of Colorado (R., 66), with denial of petition for rehearing (R., 84).

The adverse claim and suit of defendants in error was based upon the location of the premises as a placer mining claim December 14, 1877. The plaintiff in error claimed

under certain alleged lode locations made in November, 1890. The trial court found (R., 63) thus:

> "The court is satisfied from the evidence that the "Searl placer was duly located as required by the "law in 1877, and that the annual labor has been "performed as required by law to the present time. "The court is further satisfied that the defendants "have discovered a lode claim within the boundaries "of the Searl placer, but that the discovery was made "subsequent to the location of the placer."

Upon this finding the court then stated that—

> "The questions to be determined in this care are, "Has the locator of the placer the exclusive right to "the possession, and can a prospector enter within "the boundaries of the placer and discover a lode "claim before application for a placer patent is "made?"

Thereon the court invited filing of briefs and argument by counsel, which being done resulted in its decision (R., 64) that—

> "The locator of a placer mining claim has the ex- "clusive right to the possession thereof, and a pros- "pector cannot enter within the boundaries of a "placer and discover a lode claim unless there has "been an abandonment by the placer claimants. "The defendants having entered upon a valid sub- "sisting location of a placer mining claim owned by "and in the possession of the plaintiffs, did not "initiate any right whatever."

In affirming this judgment the supreme court of Colorado, in concluding its well-reasoned opinion therein, said (R., 70):

> "Our conclusion, therefore, is that one may not go "upon a prior valid placer location to prospect for un- "known lodes and get title to lode claims thereafter dis- "covered and located in this manner and within the "placer boundaries, unless the placer owner has

"abandoned his claim, waives the trespass, or by his "conduct is estopped to complain of it. If the trial "court intended to rule that in no circumstances may "one, before application for patent of a placer claim, "go upon the ground within its exterior boundaries "for the purpose of locating a lode, it went too far; "yet as general language in an opinion must be taken "in connection with the facts of the particular case, "the ruling here should be limited to the facts dis- "closed by the record, and no prejudicial error was "committed. For, under the authorities, a prospector "may not enter upon a prior placer location for the "purpose of prospecting for, or locating, unknown "lodes or veins; and to uphold the judgment we must "presume that the evidence before the trial court "showed that the veins or lodes upon which defend- "ant's grantors based their locations were unknown "when they entered upon the Searl placer for the pur- "pose of prospecting.

"The mere fact then, that the judgment may have "been based upon a legal proposition—too broadly "stated as a universal rule—that in no case may a "location of a lode claim be made within the bounda- "ries of a prior valid placer location,—a legal con- "clusion which, as we have said, is only partially "right,—is not, under the facts of this case, sufficient "to work a reversal; for certainly a lode location "may not thus be made except of a known lode. "Though a prospector may believe that within the "limits of a placer location a lode may exist and by "development work be disclosed, he has not the right "to enter thereupon for the purpose of exploiting the "ground to confirm his belief."

And in the second opinion of the State supreme court denying petition for rehearing the same conclusion was thus well expressed (R., 87):

"*In Del Monte M. & M. Co. v. Last Chance M. & M.* "*Co.*, 171 U. S., 55, the court, in making answer to ques- "tions certified to it by the United States circuit court "of appeals of the eighth circuit, said that 'the lines

"'of a junior lode location may be laid within, upon or
"'across the surface of a valid senior location for the
"'purpose of defining for or securing to such junior
"'location underground or extralateral rights not in
"'conflict with any rights of the senior location.'
"And this answer, plaintiff in error now contends, is
"authority for its contention to which we have just
"referred. With this we cannot agree. Mr. Justice
"Brewer, who wrote the opinion in that case, ex-
"pressly recognizes the fact that no rights can be in-
"itiated as the result of a trespass, and on page 79 of
"the opinion says that the form in which the ques-
"tion is put excludes any impairment or disturbance
"of the substantial rights of the prior locator; and
"he quotes with approval the statement from 1 Lind-
"ley on Mines, section 363, that 'a subsequent locator
"'may not invade the surface territory of his neigh-
"'bors and include within his boundaries any part
"'of a prior valid and subsisting location. But con-
"'flicts of surface area are more than frequent.'
"While the learned judge was speaking of lode
"claims, the principle is just as applicable to a placer
"claim to the extent of the surface rights which be-
"long to it. So long, therefore, as lode claims are not
"known to exist within the limits of the prior placer
"claim at or before the time of the application for
"placer patent, it is unlawful for one to go within its
"limits for the purpose of prospecting for, and with
"the hope of discovering and locating them."

The brief submitted by counsel for plaintiff in error fails to set forth the record facts in any connected form. Before endeavoring to supply this omission we desire to sharply challenge the "statement of case" upon their brief, pages 1–5. The mineral lands in and adjacent to Leadville had for many years prior to the creation of that city been held and worked as placer mining claims, and such claims in California gulch and its neighborhood had yielded millions of dollars in placer gold. In fact, a large part of the present city of Leadville stands upon the Thomas Starr placer claim,

which was patented as such on March 29, 1879. The validity of that patent was sustained by this court in *Smelting Company vs. Kemp*, 104 U. S., 636, and *Steel vs. Smelting Company*, 106 U. S., 447. The Searl placer claim here involved adjoins this patented Thomas Starr placer mine, and the mineral formation of each is identical.

The patent for this Starr placer mine was issued after protest and extended hearing had in July, 1878, wherein the Commissioner of the General Land Office in October, 1878, held the land to be mineral and the placer claimants' occupation long antecedent to the townsite. Upon the character of the land the Commissioner ruled thus:

> "The weight of testimony shows that all the land "embraced in this claim was regarded as placer "mining ground as early as 1860; that it was pros- "pected with favorable results in different localities; "that it has not all been worked because of the lim- "ited supply of water and want of proper facilities; "that 'California Gulch,' which is a part of this claim, "and lies on the southerly portion thereof, has been "worked for a long time, and a large amount of gold "taken therefrom; that placer mining is being ex- "tended from said gulch northwardly towards the "settled portion of the town; and that, while gold has "been found in all parts of this claim, no one has "opened a shaft on the northern part of the claim, "which has been sunk to bed-rock, and it is man- "ifestly impossible to estimate with any certainty the "value of that part of the claim as mineral land; "yet that it is mineral land, of more or less value, is "clearly established by the record. It also appears "that it is not feasible to work the northern portion "of the claim until after the lower portion shall have "been worked out; it shall be reached by slow ap- "proaches in the regular progress of operations which "are gradually being extended from California Gulch "towards the north; and hence the fact that it has "not been worked cannot have the effect of raising "even a presumption of its non-mineral character."
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> *Sickle's Mining Law & Decisions*, 1881, p. 351.

On appeal the Secretary of the Interior affirmed this decision, holding, after careful consideration of the evidence, that—

> "I concur with you that the land embraced in the "application is land which should under the pro- "visions of section 2318, Revised Statutes, be held as "'valuable for minerals' and should be reserved from "sale except as provided by law regulating the sale "of mineral lands."
>
> *Ibid.*, pp. 353, 354.

Counsel are hence in error when they assert that before July, 1878, "the great mining camp of Leadville had in meantime "become fully established and the lode character "of all its mineral lands fully demonstrated." *Contra*, placer mining was being actively carried on, and its large extent is plainly visible today from the wash and debris created thereby. Hence at the time of the location of the Searl placer, in December, 1877, the placer character of the deposit had been fully determined by actual working, and it is well known that the loose rock and earth carrying this placer deposit covers substantially the whole area of and surrounding the city to great depth; so that the discovery of underlying lodes has since been made only by sinking several hundred feet below this surface deposit to reach any semblance of lode or vein matter in place. It is equally incorrect to assert, as do counsel, that the United States Land Department and the Federal courts have upon any fair trial of the *fact* of placer deposit ruled this land not to be placer or subject to location as such. On the contrary, the very first decision rendered in the Department by Mr. Secretary Schurz, on April 19, 1880, in a contest between the townsite of North Leadville and the claimants of the Searl placer, and involving the direct question, distinctly held upon the testimony adduced in that trial that this placer claim "was valuable for minerals within section 2318, U. S. R. S."

Copp's Land Owner, vol. 7, p. 36.

Counsel are equally in error in asserting that *any* decision of the United States Land Department has held the Searl placer location void. *Contra*, that Department in declaring the meaning of its own decisions thereon (its undoubted and exclusive right) has in express language disavowed any such holding or intent.

In re Clipper Mining Co., 22 Land Decisions, 527. R., 62–63.

The relevant facts on which this controversy depends cannot be more concisely and correctly stated than as given in the opinion of the supreme court of Colorado, thus (R., 66–68):

> "The plaintiff in error (defendant below) owns four "lode mining claims, situate in Lake county, called "the Capital, Clipper, Congress and Castle lodes, and "the defendants in error (plaintiffs below) own the "Searl placer mining claim, within the boundaries "of which these lode claims are located. The present "controversy relates to the territory thus in conflict. "The placer was the prior location, and was made in "the year 1877. The plaintiff in error having made "application in the land office for patent of its lode "mines, the defendants in error filed therein an ad-"verse claim, and within the statutory time brought "this action in the district court of Lake county to "enforce it.
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> "The plaintiffs rely upon a prior location of the "conflicting territory as part of their placer claim. "The complaint is in the ordinary form in actions of "this character. After a general denial of the mate-"rial allegations of the complaint, the answer sets up "four separate defenses, all of which grow out of the "following facts, which, in varying language, are set "up in each defense.
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> "On the 12th of December, 1877, A. D. Searl and "others located the Searl placer, and on the 5th of "July, 1878, applied for a patent therefor. Numerous "protests were made against it, and on the 10th of "November, 1882 an amended application was filed

"against which protests were likewise made upon the "ground that the same was not placer ground, and "was only valuable for lode claims, or townsite pur- "poses. The Land Department ordered a special in- "vestigation to ascertain the character of the ground "and the good faith of the applicant. The special "agent declared that the land was not placer ground, "and on the strength of his report a hearing was or- "dered before the local land office of the district, the "result of which was a dismissal of the application, "for it was not then made to appear, as a present "fact, that the ground was distinctively valuable for "mining purposes, or that the applicant had made "the improvements required by statute. This rul- "ing was affirmed by the Commissioner of the "Land Office and in turn by the Secretary of the In- "terior. Twelve days after the latter's decision, the "grantors of defendant company entered upon the "ground within the boundaries of the placer location "and thereafter located thereon the lode claims in "question.

"The special defenses sought to be interposed were "substantially: *First*, that plaintiff was not entitled "to recover because, upon the previous application "for a patent of the Searl placer, there was a decision "of the Land Department that the ground included "within its boundaries was not placer ground, and "the attempted location was for that reason void, and "such decision was *res adjudicata* of the present con- "troversy; *second*, assuming the existence of a prior "valid placer location, nevertheless defendant, prior "to the time patent was asked, went upon the placer "surface area and made locations of the lode claims "which were then and theretofore known to exist, "and, therefore, in law the same were a part of the "unappropriated public domain and subject to loca- "tion as lode claims.

"There was a replication by plaintiffs denying the "new and special matters of defense, and upon the "issues thus joined, in a trial to the court without a "jury, the findings were that the Searl placer was "duly located as required by law in the year 1877 "and thereafter the annual labor had been performed

"as the statute provides, and that defendant's grantors "had discovered the lode claims within the bound- "aries, and subsequent to the location, of the Searl "placer. Based upon these findings of facts, the con- "clusion of law was drawn that a prior location of a "placer carries with it the exclusive right of posses- "sion of the surface included within the exterior "boundaries, and a prospector might not enter there- "upon and prospect for, or discover, a lode claim be- "fore application for the placer patent is made, unless "by abandonment the placer claimant has lost his "rights. And there being no evidence of such loss, "it was accordingly held that the acts of defendant "in entering upon the valid subsisting placer loca- "tion did not initiate any right whatever. Judg- "ment was therefore entered in favor of the owner "of the placer location, and to reverse it this writ of "error is prosecuted."

ARGUMENT.

Numerous errors are assigned (R., 6–8), but the brief for plaintiff in error presents but three propositions for discussion here.

I.

THAT THE UNITED STATES LAND DEPARTMENT HAS HELD THIS PLACER LOCATION VOID, AND SUCH DETERMINATION IS BINDING UPON THE COURTS.

Responding to this contention, the supreme court of Colorado holds (R., 68):

"1. It is insisted by plaintiff in error that the Land "Department, with which is entrusted the determina- "tion of such questions, has declared this placer lo- "cation void because not on placer ground, and that "such determination is decisive of the present con- "troversy. It is unquestionably the law that find-

"ings of fact by the Land Department as to matters "within its jurisdiction are conclusive upon the courts "whenever a collateral attack is made upon them. "They may, in a proper proceeding, be impeached "for fraud or mistake, but not in actions like the "present. This rule, however, has no application to "the facts in this record. The application for a "patent to the placer was rejected, but there was no "decision that the ground in question was not placer "ground but merely that, as a then present fact, there "was not such a showing by the applicant as entitled "him to a patent. Amended applications for a "patent of a mining claim are permissible under the "practice in the Land Department. There was no "attempt finally or definitely to determine that the "ground was not placer ground, or that the location "was void, and to that effect are its own decisions, as "will be seen by reference to the official reports.

"7 Copp's Land Owner, 36.

"*In re* Searl Placer, 11 Land Dec., 441.

"*In re* Clipper Mining Co., 22 Land Dec., 527.

"In the last case the Secretary of the Interior, in "speaking of the contention made in this very case, "says: ''The judgment of the Department in the "'Searl Placer case went only to the extent of reject-"'ing the application for patent. The Department "'did not assume to declare the location of the placer "'void, as contended by counsel, nor did the judg-"'ment affect the possessory rights of the contestant "'to it.' See also *Clipper Mining Co. v. Searle*, 29 "Land Dec., 137. Indeed, the question as to the "character of the land sought to be appropriated by "claimants under the public land laws is reserved,— "unless under the law referred to some court,—and "may be passed upon, by the Department until patent "issues.

"*Barden v. N. P. R. R. Co.*, 154 U. S., 288.

"This court in *Beals v. Cone*, 27 Colo., — (62 Pac. "Rep., 948), held that a decision of the Land Depart-"ment like the one in question is equivalent to noth-"ing more than a judgment as of nonsuit, and not

"conclusive upon the Department itself or upon the "parties.

"An additional reason why the plea of *res adjudi-* "*cata* cannot be sustained is that in the former pro- "ceedings the parties are not the same as those in "the present action."

The Secretary's decision *In re Clipper Mining Co., supra* (R., 62, 63), was rendered upon the application of that company to enter the ground here in controversy. It contended there, as here, that the former decision of the Department had finally adjudicated and extinguished the Searl placer claim, and hence the pending adverse claim based thereon should be dismissed, and this adverse claim suit now here at bar ignored. The Secretary denied the application; declared the Department "ousted of all jurisdiction until the case now in court is finally disposed of," and, responsive to the argument and claim of the Clipper Company, added the language quoted *supra* by the supreme court of Colorado. It is manifest such ruling was in no sense *obiter dicta*. The decision was invited by the plaintiff in error. The power of the Secretary to thus authoritatively declare the meaning and effect of the former decision of the Department is beyond question. Every court has and exercises such authority and right. The office of the Secretary is a continuing one; the incumbent acts officially, not as an individual (*Beley vs. Naphtaly*, 169 U. S., 353, 364), and his decision declaring the extent and meaning of a former decision so officially rendered, the case still being *in fieri*, is, we submit, controlling here.

But were this question here open for review we submit fair analysis of the former decisions will demonstrate that the court below correctly ruled thereon.

The decision of the United States land office at Leadville was not introduced in evidence at the trial, and we have no knowledge of what that decision was, except as we gather it

from the decision of the Commissioner of the General Land Office, dated March 6, 1886 (R., 58), which is as follows:

> "You decided that patent should not be issued for "the Searl placer, 1st, because the improvements "thereon were not sufficient, nor of the character re- "quired by law; and, 2nd, because the evidence did "not satisfactorily show that the claim was more "valuable for placer mining than for other purposes."

This decision was rendered by the United States land office at Leadville in the case of North Leadville *vs.* Searl, upon testimony which was taken in November, 1883, in a controversy between squatters upon the public domain and the placer applicants, the squatters claiming that the land *at that time* was more valuable for town lots—"other purposes"—than for placer mining.

Can it be even pretended that the above-quoted decision of the United States land office at Leadville declared void the *location* of the Searl placer or attempted to cancel and annul the possessory rights of those claiming under such *location?* There is certainly nothing in the language of the decision which would indicate any such result or any such intention or purpose.

It will be well to bear in mind the above-quoted decision of the United States land office at Leadville, as it is the *basis* and *foundation* of the decision of the General Land Office and the Secretary of the Interior, which later decisions are simply decisions or judgments of affirmance.

The decision of the Commissioner of the General Land Office dated March 6, 1886, is set forth in full in the Record, pp. 55–60. This decision of the Commissioner is a full review of all decisions had in the Land Department of the United States up to the date of its rendition, with reference to obtaining United States patent to the land in controversy in this action.

At page 55 we find that Robert Berry, special agent of the

Government, on the 14th of December, A. D. 1882, reported that he found that there were no placer improvements on the property; that there were improvements for townsite purposes, and that the land was being rapidly built upon as the city of Leadville increased in size. He reported further that the land was "*supposed*" to contain lodes or ledges of carbonate mineral. While it may be a fact that Mr. Berry did not find sufficient placer improvements on the property to entitle the applicant to a patent in 1882, that is no evidence that there were not sufficient improvements made to absolutely perfect the title to the placer on November 25, 1890, when the grantors of the plaintiff in error jumped the ground. The fact that Leadville was increasing in size and the placer being built upon in 1882 could not and did not vitiate the rights of the placer location made in 1877 and perfected either before or after the examination by Mr. Berry.

The court will also notice that nowhere in the record, or elsewhere, does it appear that the claimants of the Searl placer ever permitted building upon the ground or used the same in any manner for townsite purposes.

Mr. Berry further reports that the land was "*supposed*" to contain lodes or ledges of carbonate mineral, and in this connection we call attention to the fact that he only reported that lodes were "*supposed*" to be contained in the land, and that had there been any lodes *known* to be in the land, even in 1882, he would have very promptly reported that fact; but a *supposed* lode and a *known* lode are two different things, as is very clearly set forth by the United States Supreme Court in the case of Sullivan *et al. vs.* The Iron Silver Mining Company, 143 United States, at page 431, in which the court says that "the knowledge of a vein or lode which covers the expression '*known to exist*,' must be '*actual knowledge*.'"

At page 56 it appears that on the 16th of December, 1882, M. H. Sears, on behalf of himself and others, as townsite

claimants, filed a protest, alleging, among other things, that the Searl placer, the ground in controversy, was not placer ground; that it was immediately adjacent to a well-defined system of lodes; that in December, 1882, the Secretary of the Interior ordered a hearing; that in September, 1883, a hearing was had, witnesses sworn, and other proceedings taken, and then the Commissioner (R., 57, 58) reviews all the testimony taken by the land office, in which it appears that there were witnesses who testified that the land had been properly improved and was placer ground, and other witnesses testified that it was not placer ground and had not been properly improved.

At page 58 the Commissioner quotes the decision of the United States land office at Leadville, as follows:

> "1st. Because the improvements thereon were not "sufficient, nor of the character required by law; "and, 2nd, because the evidence did not satisfactorily "show that the claim was more valuable for placer "mining than for other purposes."

This decision we have already quoted above as having been rendered in the case, North Leadville *vs.* Searl. The Commissioner then says that it was contended by the Searl claimants that a former hearing which was had was *res adjudicata*. Whereupon (p. 59) the Commissioner very wisely decides as follows:

> "One of the essential principles necessary to consti- "tute a matter *res adjudicata* is the identity of the "parties. The parties to the present hearing were not "the parties to the former trial. Independent of this, "however, the objection to the hearing upon the "ground mentioned is not well taken. The *matter* "as to the character of the land is not finally adjudi- "cated until the *title passes from the Government.*"

Then follows a discussion of the question as to *res adjudicata* with reference to the character of the land, with the following conclusion:

"And so long as the subject-matter is under the "control of the Land Department, no number of "trials and decisions will estop further inquiries and "investigations to assure a satisfactory conclusion. "The character of the land has therefore not been "finally determined and it must be decided upon the "testimony taken at the hearing."

This decision of the Land Department seems to us to be conclusive of the point contended for by counsel for plaintiff in error.

While the Commissioner says that he is satisfied that the land is not placer mining ground, he further says that he is not satisfied that the expenditures necessary to acquire a patent are sufficient, and that since the proof does not show that there has been any discovery of a lode within the placer survey, and does not indicate the probable existence of mineral in rock in place, that he was of the opinion that applicants were trying to get the land for townsite purposes (R., 59).

But the undoubted decision of the Commissioner just quoted above is that "the matter as to the character of the land is not finally adjudicated until the title passes from the Government." If that be true, as laid down by the Commissioner in the decision upon which the plaintiff in error relies, then it seems to us to be conclusive that the court below had jurisdiction, fifteen years thereafter, to pass upon and determine the same question, when the matter under the statutes of the United States was pending in a court of competent jurisdiction upon an adverse proceeding.

The Commissioner concluds his decision with a rejection of the application for patent, which cannot be construed to be a cancellation of the *location* of the Searl placer, as is so strenuously contended for by counsel for plaintiff in error.

An appeal was taken from this decision of the Commissioner of the General Land Office, and the decision of the

acting Secretary of the Interior thereon is set forth in full in the Record, pp. 60–61.

The acting Secretary says:

> "Upon the evidence adduced at the hearing had "(November, 1883), the local officers found that the "land was not distinctively valuable for placer min- "ing, and that the same had not been improved as "required by law."

The acting Secretary affirms the decision of the Commissioner as to the question of *res adjudicata* in the following language, holding that the Land Department has jurisdiction to ascertain and determine the character of the land "*until* "*the lands have been either patented or certified* * * *"

As to the merits of the case at bar, he does not decide that the land is not placer ground, but decides as follows:

> "I think that, by a fair preponderance, the evi- "dence establishes the fact that continued prospect- "ing for several years failed to disclose, in any ap- "preciable quantity, the presence of valuable placer "mineral in the claim, or to establish as a 'present "'fact,' within the meaning of section 2329, R. S., the "'placer' character of the land. It further appears "that while the appellant has constructed some "ditches on the tract, he has brought no water "thereon, and that the work on the claim consisted "mainly in making a considerable number of shafts "with a view to the discovery of 'lodes' and not for "the purpose of 'placer' development."

The Secretary quotes the case of *Peirano et al. vs. Pendola*, 10 L. D., 536, which decision we desire to call to the attention of the court, as it formally decides that all decisions with reference to the character of the land are based upon the *present* condition of affairs.

We desire again in this connection to call the attention of the court to the fact that the foregoing decisions of the register and receiver of the local land office, the Commissioner

of the General Land Office, and the acting Secretary of the Interior were rendered in the case of North Leadville *vs.* Searl, a proceeding based upon the protest filed in the United States land office at Leadville in 1882 by citizens of North Leadville, in which the principal contention was that the land in controversy was more valuable for townsite or town lot purposes than for mining.

It does not appear, either from the decision of the register and receiver, the decision of the Commissioner of the General Land Office, or the decision of the Secretary of the Interior, that they or either of them attempted to decide that the *location* of the Searl placer itself was void. The register and receiver decided that the applicants were not entitled to a patent because the land was not more valuable for placer, *as it appeared at that time*, November, 1883, than for other purposes, and because *sufficient improvements had not then been made* in order to entitle the applicants to a patent.

The Commissioner decided that he did not believe it was placer ground *at that time*, and that sufficient improvements had not been made; and, further, that a hearing on the matter in another case was not *res adjudicata*, because the same parties were not before the Department, and also because the question as to the character of the land would not become *res adjudicata* until final entry was made.

The Secretary of the Interior decided that, in a question of that kind, no decision of the Department was *res adjudicata*, and that sufficient improvements had not been made to entitle the applicants to a patent, and also that it did not appear as a *present* fact that the ground was valuable for placer.

As before stated, the decision of Secretary Smith quoted from *supra* refers to the identical ground in controversy in the suit at bar, and to the identical adverse in support of which the case at bar is brought, and decides the identical question which counsel for plaintiff in error is endeavoring to have this court now decide, and which the court below

decided was not *res adjudicata* when it overruled their motion for judgment on the pleadings, and when it admitted testimony concerning the location of the Searl placer and concerning the character of the ground in dispute.

We have here the Land Department deciding, first, that its decision with reference to the character of land is never *res adjudicata* until the title has passed from the Government; second, that as a matter of fact, in this identical case, it did not assume to decide that the location of the placer was void, and that the decisions relied on by plaintiff in error did not in any way affect the possessory rights of the placer claimants to the ground. On the second point the court of last resort has held and decided, as a matter of fact, that there was no judgment of the Land Department, such as is contended for by plaintiff in error, and, as said in plaintiff's brief, the courts will not interfere with any finding of fact made by the Department upon any matter within its jurisdiction. As to the first point, the Department has authority to determine what the effect of its decision or finding is, and the Department has held, as before stated, that the question as to the character of the land always remains an open question until the land is disposed of, and that the Department itself still has the right to pass upon the character of the land until it has parted with the title thereto, and that *when an adverse is filed, the Department is ousted of its jurisdiction.*

We do not think that any one could reasonably contend that if a judgment of the Department was not *res adjudicata* as to the Department, that it would be *res adjudicata* as to the courts in an adverse suit. Indeed, the converse of this is true. The United States courts have repeatedly held for the right of courts to review and correct decisions of the Land Department. See the recent case of George *et al. vs.* Riddle *et al.*, which is reported in 94 Fed. Rep., p. 689, where the ruling of the Secretary of the Interior in canceling an entry was reviewed and reversed by the United States circuit court more than twenty

years thereafter. It would seem by this decision that no act of the Land Department can become *res adjudicata* as to the *courts*. But there can be no question, from an examination of the decisions, regardless of the opinion of Secretary Smith, that the Land Department did not undertake or assume to declare the placer location void, and the courts below and this court could well find, and the courts below did find, that, as a matter of fact, the Department did not adjudicate the matter.

We will therefore conclude the matter of the rulings of the Land Department as follows:

1. There has been no ruling of the Land Department inconsistent with the finding of the court below, viz., that the defendants in error have a valid placer location and are entitled to the possession thereof; and,

2. Even if the rulings of the Land Department are binding upon the courts, as contended by counsel for plaintiff in error, then the rulings which must govern all others and the decision of the court are those which are first made. These are:

First. That of Secretary Schurz, in 1880 (Copp's Land Owner, vol. 7, p. 36), that the ground in controversy is mineral land in character as opposed to a townsite (it will be observed that this ruling was based upon evidence of placer gold discoveries, and that it was rendered more than fifteen years before any lode, according to the record, was discovered in the ground in controversy); and

Second. That of Commissioner Williamson, in 1881, that the ground was properly located as a placer, and that a subsequent discovery and location of a lode thereon by an outsider is illegal. (See, for the former ruling, Copp's Land Owner, vol. 7, p. 36; and for the latter see Commissioner's letter "N" to the register and receiver, Leadville, dated May 31, 1881, as hereinafter quoted.)

But, granting everything contended for by counsel, the principle of *res adjudicata* cannot apply in this case for another reason: Commissioner Stockslager has declared (R., 59), in a case exactly similar to the one at bar, and affecting the same ground, that "one of the essential principles necessary to constitute a matter *res adjudicata* is the identity of the parties."

The court will notice from the record that the evidence upon which they base their claim of *res adjudicata* was taken in the latter part of the year 1883, in the matter of North Leadville *vs.* Searl. The record also shows that the grantors of the plaintiff in error were not parties to that hearing, and that they did not make any claim to the land in controversy until November, 1890, at least seven years thereafter.

> "As a rule, a judgment is not admissible in evi-
> "dence for or against a stranger to the action in
> "which it was rendered."
>
> *12th Am. and Eng. Ency. of Law*, p. 84.

The defendant below was a total stranger to the so-called judgment of the Land Department relied upon by plaintiff in error, and it seeks to introduce the judgment in evidence in its behalf.

> "There is no principle of law more familiar or bet-
> "ter settled than that estoppels to be binding must be
> "mutual. No party can take advantage of a judg-
> "ment or decree if he would not have been prejudiced
> "by it if it had been otherwise. In general, no one
> "is bound unless he was either a party or privy to
> "the adjudication."
>
> *Chandler's Appeal*, 100 Pa. St., 263.
> *McDonald vs. Gregory*, 41 Iowa, 513.
> *Green vs. Beeson et al.*, 31 Ind., 7.
> *Scates vs. King*, 110 Ill., 456.
> *Mayo vs. Wood*, 50 Cal., 171.
> *Paper Co. vs. O'Dougherty et al.*, 81 N. Y., 474.
> *Buckingham vs. Ludlum*, 37 N. J. Eq., 137.

"Where the record in a prior suit fails to show "that a party setting up a judgment in such suit as "a bar to another suit was a party to the prior suit, "it cannot constitute a defense."

Walters vs. Wood, 16 N. W. Rep., 116.

It is evident in the case at bar that, had the decision of the Land Office been in favor of the placer claimants, allowing an entry to be made, and for any reason the placer claimants failed to perfect their entry or procure a patent, the plaintiff in error or its grantors, who jumped the property, would not have been bound by any finding or judgment made by the Land Office in the former proceeding, and they could have produced evidence and protested and contested such application in the Land Department or in the courts, at any time before patent. So that there is no mutuality between the parties to this action in the alleged or so-called judgments of the Land Department.

Thus it is apparent from the record that no judgment of cancellation of the *location* of the Searl placer has ever been rendered by any official of the Land Department, as asserted and claimed by the counsel for plaintiff in error; that the issues presented by the pleadings in the court below were not *res adjudicata*, and that the highest official of the Land Department of the United States has expressly decided that—

"The Department did not assume to declare the "location of the placer void, as contended by coun- "sel, nor did the judgment affect the possessory "rights of the contestant to it."

Opposing counsel quote at pages 68–69 of their brief the unreported decisions of Judges Hallet and Riner, which merely *assume* that the decisions of the Land Department discussed *supra* held the Searl placer location to be void. These cases were decided by those learned judges without having before them the decision of the Secretary *In re Clipper*

Mining Company, quoted *supra* (R., 62, 63), expressly holding that the Department had *not* so decided. The case before Judge Hallet was ruled upon demurrer, and in the quoted decision of Judge Riner he finds that it is not "established as a fact by the testimony that the necessary assessment work has been performed," while in the case at bar, as against *this* plaintiff in error, such fact is so established and expressly found (R., 63).

Moreover, the conclusion of Judge Riner, as applicable to this case, that the findings of the Land Department "must "be held to be conclusive upon the question of fact—that is "to say, as to the character of the land, etc."—is not in accord with the later and express decision of this court in *Shoshone Mining Company vs. Rutter*, 177 U. S., 505, 511. That case involved the question whether an adverse claim suit was *per se* Federal in its nature and hence within the jurisdiction of the Federal courts. In reaffirming its former decision to the contrary, the court said:

> "Counsel also calls our attention to the difference "in the procedure in the disposal of agricultural and "mineral lands. With respect to the former all pro- "ceedings are carried on in the Land Department, "and it is only after the legal title has passed by "patent that inquiry is permissible in the courts, "while in respect to the latter the aid of the courts "is invoked before the issue of a patent and in order "to determine to some extent the right thereto. No- "ticing this distinction he also notes the fact that a "contest in respect to the validity of a patent for agri- "cultural lands can be litigated in the Federal courts, "and hence draws the inference that a contest pre- "liminary to a patent for mineral lands, and involv- "ing the right thereto, must also be one which can "be litigated in the same courts. But we think the "true inference from this difference of procedure is to "the contrary, because, in respect to agricultural "lands, it is settled that all questions of fact are deter- "mined by the Land Department, and that after the "issue of a patent only questions of law are open for

"consideration in the courts, and as the laws oCon-
"gress alone determine the matter of the disposal of
"the public lands it follows that the questions of law
"which are thus open for consideration are those
"arising under the acts of Congress. While on the
"other hand, as we have heretofore shown, in these
"adverse suits preliminary to a patent of mineral
"lands not merely questions of law arising under the
"statutes of the United States, *but questions of fact and*
"*questions arising under local rules and customs and*
"*State statutes are open for consideration.* The scope of
"the inquiry which is permissible in the two cases
"emphasizes the fact that in the latter case the con-
"troversy may be one not arising under the Consti-
"tution or laws of Congress."

Practical illustration of this doctrine is found in the prior decision of this court in *Bennett vs. Harkrader*, 158 U.S., 441, involving an adverse claim suit by a prior placer locator against a subsequent lode locator. As therein stated, exception was taken in the trial court to the following instructions given, *inter alia* (p. 443):

"You have two ultimate questions to consider and
"those only, namely:
"(1.) Is the plaintiff the owner of the Bulger Hill
"and the Nugget Gulch placer claims and entitled to
"the possession of the soil included within them, and
"are they located on the ground as he has described
"them? Or—
"(2.) Are the defendants the owners of the Aurora
"lode and entitled to the possession of the soil em-
"bracing it, and is it situated on the ground called
"for in the description, in their answer?"

Commenting thereon, the court said (p. 446):

"So far as respects the two instructions complained
"of, it cannot be doubted that they are correct state-
"ments of the law. The two ultimate questions for
"the jury were as stated."

The verdict was:

"We, the jury, find for plaintiff."

This, it was urged, was insufficient.
In overruling that contention this court said (p. 447):

> "Again, in this action, brought under a special "statute of the United States in support of an adverse "claim, but one estate is involved in the controversy. "No title in fee is or can be established. That re- "mains in the United States and the only question "presented is the priority of right to purchase the "fee. Hence the inapplicability of a statute regulat- "ing generally actions for the recovery of real estate, "in which actions different kinds of title may be suf- "ficient to sustain the right of recovery. It would be "purely surplusage to find in terms a priority of the "right to purchase when that is the only question "which can be litigated in such statutory action."

Manifestly in the case cited the ultimate facts submitted to the jury involved determination as necessary elements thereof that the land was or was not valuable for placer deposits, and had been lawfully located and held as such. The issue presented could not have been determined without such basic finding. So in the case at bar the finding of the trial court that the placer location was valid and had been continuously maintained necessarily involved as a constituent element of such finding that the land was in fact valuable for placer mining. That was necessarily involved in the issue presented and in the ultimate fact of a valid placer location which the court expressly found. In so doing, both in the case just cited and in the case at bar, such ultimate facts which determined the right of possession plainly involved determination of all elemental facts necessary to reach the finding of ultimate fact. And as clearly Congress intended that the jurisdiction invested in the courts under the adverse claim provisions of the

statute should cover these essential facts necessary to the exercise of the power to hear and determine the controversy as thus presented thereunder and to determine therefrom "the question of the right of possession" (sec. 2326, U. S. R. S.), or, as stated in the case last cited, "the priority of right to purchase the fee." With jurisdiction thus plainly conferred and constantly exercised, it is plain the finality attending the determination of facts by the United States Land Department in controversies affecting disposal of agricultural land can have no application in respect of controversies between mineral claimants sent by express provision of statute into the courts for such exclusive and controlling determination.

II.

THE EXTENT OF THE PLACER LOCATOR'S RIGHT OF POSSESSION UNDER A VALID PLACER LOCATION.

The brief of opposing counsel (p. 6) states the question thus:

> "Can a citizen of the United States enter the limits "of a valid placer location held by possessory title "only, and discover and locate a lode found to be "actually existing therein and not claimed or located "by the locator of the placer?"

Upon this record the question is thus too broadly stated. The inquiry as it here stands for judgment is stated with legal acumen and clearness in the opinion below, thus (R., 89):

> "The question therefore is presented whether, and "if so, in what circumstances, one may, before appli- "cation for a patent of a prior valid placer location is "made, go upon the same for the purpose of pros- "pecting the ground and thereafter make a location "of a lode claim based on a discovery thereafter and "thus made of a vein or lode therein.

Thereon the court holds (R., 70):

"If in the case at bar, the lode claims were known "to exist at the time of the entry of defendant's "grantors upon the Searl placer, under the decision "in the Mt. Rosa case, the entry was not unlawful; "but if on the contrary, the veins were then unknown, "by the same decision the right of possession of this "ground belonged to the owners of the placer loca- "tion. Their right of possession included these un- "known veins, and the entry for prospecting was a "trespass, and no title could thereby be initiated.

"As the evidence was not brought up in the bill of "exceptions, we must assume in support of the judg- "ment below that the proof was against the defend- "ant upon this point. Indeed the specific finding of "the trial court that defendant's grantors went upon "plaintiff's prior existing placer location and *discov-* "*ered* and located lodes therein, involves the finding "that the lodes were unknown at the time of the "entry; for if they were known, they were not dis- "covered by the prospectors, but were already subject "to location by them; and if then unknown, the "placer owner was entitled to their exclusive posses- "sion, and entry upon them by others constituted a "trespass and could not initiate title."

A large amount of testimony was taken upon the trial of the case at bar as to the location of the placer, as to the doing of the annual assessment thereon, and as to the validity of the location when made, which evidence was attempted to be rebutted by the defendant in the court below. The evidence was taken before a court of record sitting as a trial court without a jury. A number of days were consumed in the hearing of evidence on those points. The court heard the evidence of the witnesses and saw their manner upon the witness stand, and also heard the evidence with reference to the alleged locations of the defendant below, as to how they entered upon and attempted to make their location of the so-called Capital, Clipper, Castle and Congress Lode

mining claims. That evidence is not preserved by the bill of exceptions, so that this court, as did the supreme court of Colorado, will presume not only that there was evidence to support the judgment, but will presume that the evidence was sufficient, and that there was a preponderance of evidence upon every point; and it will also be presumed that the court found that the attempted locations of the lode claims made by the plaintiff in error or its grantors were not made in any lawful manner within the boundaries of a valid subsisting placer claim, of which defendants in error had been in possession prior to the entry of the grantors of plaintiff in error, longer than it is required by the statute of limitations of the State of Colorado to acquire a good title.

It is also evident, as it appears at page 39 of the record, that in 1882 and in 1883 no veins or lodes of mineral had been uncovered, discovered, or disclosed within the boundaries of the Searl placer, and consequently none within the boundaries of the ground in dispute; and the record shows that, according to the testimony of the plaintiff in error's own witnesses, the ground in dispute is covered by wash and debris; and no actual discoveries were disclosed thereon prior to 1895; so that any discovery of a lode must have been made by trespassing upon a validly located mining claim and digging through "wash" and "debris," which, according to the evidence produced at the trial, overlaid the entire surface several hundred feet thick.

Upon the record facts there was hence controlling reason that the court below should further rule (R., 70):

> "Our conclusion, therefore, is that one may not go "upon a prior valid placer location to prospect for "unknown lodes and get title to lode claims thereafter "discovered and located in this manner and within "the placer boundaries, unless the placer owner has "abandoned his claim, waives the trespass or by his "conduct is estopped to complain of it. * * * "For under the authorities, a prospector may not "enter upon a prior placer location for the purpose

"of prospecting for, or locating, unknown lodes or "veins; and to uphold the judgment we must pre- "sume that the evidence before the trial court showed "that the veins or lodes upon which defendant's "grantors based their locations were unknown when "they entered upon the Searl placer for the purpose of "prospecting. * * * Though a prospector may "believe that within the limits of a placer location a "lode may exist and by development work be dis- "closed, he has not the right to enter thereupon for "the purpose of exploiting the ground to confirm his "belief."

This conclusion of the learned court not only accords with plain natural justice, but is in harmony with the mining law and its authoritative exposition. The law of POSSESSION lies at its very foundation. Preceding the passage of any statute affirmatively authorizing the location of mineral lands, Congress, by an act approved February 27, 1865 (13 Stats., ch. 64, p. 441, now sec. 910, U. S. R. S.), provided:

"That no possessory action between individuals in "any of the courts of the United States for the re- "covery of any mining title, or for damages to any "such title, shall be affected by the fact that the para- "mount title to the land in which such mines are, is "in the United States, *but each case shall be adjudged* "*by the law of possession.*"

In *Jennison vs. Kirk*, 98 U. S., 453, 457, this court said:

"The discovery of gold in California was followed, "as is well known, by an immense immigration into "the State, which increased its population within "three or four years from a few thousand to several "hundred thousand. The lands in which the pre- "cious metals were found belonged to the United "States, and were unsurveyed, and not open, by law, "to occupation and settlement. Little was known of "them further than that they were situated in the "Sierra Nevada mountains. Into these mountains "the emigrants in vast numbers penetrated, occupy-

"ing the ravines, gulches and cañons, and probing "the earth in all directions for the precious metals. "Wherever they went, they carried with them that "love of order and system, and of fair dealing which "are the prominent characteristics of our people. In "every district which they occupied they framed cer- "tain rules for their government, by which the extent "of ground they could severally hold for mining was "designated, their possessory right to such ground se- "cured and enforced, and contests between them either "avoided or determined. These rules bore a marked "similarity, varying in the several districts only ac- "cording to the extent and character of the mines; dis- "tinct provisions being made for different kinds of "mining, such as placer mining quartz mining, and "mining in drifts or tunnels. They all recognize dis- "covery, followed by appropriation, as the foundation "of the possessor's title, and development by working "as the condition of its retention. And they were so "framed as to secure to all comers, within practicable "limits, absolute equality of right and privilege in "working the mines. Nothing but such equality "would have been tolerated by the miners, who were "emphatically the lawmakers, as respects mining, "upon the public lands in the State. The first ap- "propriator was everywhere held to have, within "certain well-defined limits, a better right than "others to the claims taken up; and in all con- "troversies except as against the Government, he was "regarded as the original owner, from whom title "was to be traced."

Congress having thus by the act of February 27, 1865, *supra*, recognized the law of *possession* in respect of mineral lands, and "the first appropriator" being thus recognized as first in right, the first section of the original mining act of July 26, 1866 (14 Stats., p. 251), must be read as in harmony therewith when it provided—

"That the mineral lands of the public domain, "both surveyed and unsurveyed, are hereby declared "to be free and open to exploration and *occupation*

"by all citizens of the United States and those who
"have declared their intention to become citizens,
"subject to such regulations as may be prescribed by
"law, *and subject also to the local customs or rules of*
"*miners* in the several mining districts, so far as the
"same may not be in conflict with the laws of the
"United States."

Here was express recognition of the law of priority of possession, as applied to all "the mineral lands of the public domain."

Succeeding sections of this act provided for purchase and patent from the United States of claims to "a vein or lode "of quartz or other rock in place, bearing gold, silver, cin-"nabar or copper. * * *"

Brief experience demonstrated that the right of purchase of the fee should be enlarged. Hence, Congress by an *amending* act of July 9, 1870 (16 Stats., p. 217), added several sections to the former act, and provided, *inter alia:*

"SEC. 12. That claims usually called 'placers,' in-
"cluding all forms of deposit, excepting veins of
"quartz, or other rock in place, shall be subject to
"entry and patent under this act, under like circum-
"stances and conditions, and upon similar proceed-
"ings, as are provided for vein or lode claims."

"Under like circumstances and conditions" implied prior location and possession by the placer claimant, for the former act of 1866, in express terms (sec. 2), imposed these requirements upon the claimant of the lode or vein as antecedent to the right of purchase, and such has always been the practical interpretation of the act.

The need for this enactment was strongly stated in the House by Representative Sargent, who, among other things, said:

"There is another objection to the present system.
"Capital, as is well known is always hesitating and

"cautious. The time when the miner could find a "claim which could be easily worked and would be "quickly remunerative is past. It is very rarely now "that gold is found glittering among the grass roots. "Most of the claims now worked are deep in the "bowels of the earth; old river channels covered up "by convulsions of nature, by mountains and lofty "hills; deposits which can only be reached by long "and expensive tunnels.

"Now, generally the miner is a poor man who can- "not with his own hands alone and without capital "construct the necessary works to develop his min- "ing claim. Consequently many promising mining "enterprises lie idle which, if they could be de- "veloped, would add greatly to the taxable wealth of "the country and stimulate its trade.

* * * * * * *

"As I have already said—and I repeat it, for I "wish to impress it upon the minds of gentlemen— "the day of easy mining is past. The gold which so "stimulates the business of the country, which en- "ables us to pay the interest on our debt, and in a "great degree to keep up our balance of exchanges in "the markets of the world, comes from long, hazard- "ous, or difficult enterprises, which require years of "labor and much capital in order that they may be "carried to a successful result."

Cong. Globe, pt. 3, 2*d sess.* 41*st Cong.*, p. 2028.

That such priority of location, lawfully initiated and maintained, gives priority of right and protects the holder thereof from the intrusion of another, the courts have uniformly declared.

Thus in *Belk vs. Meagher*, 104 U. S., 279, 283, 284, it was held:

"A mining claim perfected under the law is prop- "erty in the highest sense of that term, which may "be bought, sold and conveyed and will pass by "descent. * * * Mining claims are not open to "relocation until the rights of a former locator have

"come to an end. A relocator seeks to avail himself "of mineral in the public lands which another has "discovered. This he cannot do until the discoverer "has, in law, abandoned his claim and left the prop- "erty open for another to take up. The right of loca- "tion upon the mineral lands of the United States is "a privilege granted by Congress but it can only be "exercised within the limits prescribed by the grant. "Locations can only be made where the law allows "it to be done. Any attempt to go beyond that will "be of no avail. Hence, a relocation on lands "actually covered at the time by another valid and "subsisting location is void; and this not only "against the *prior locator*, but all the world, because "the law allows no such thing to be done."

In the case of *Gwillim vs. Donnellan*, 115 U. S., p. 45, the court holds (p. 49):

"A valid and subsisting location of *mineral lands*, "made and kept up in accordance with the provisions "of the statutes of the United States, has the effect of "a grant by the United States of the right of present "and exclusive possession of the lands located. If, "when one enters on land to make a location, there "is another location in full force, which entitles its "owner to the exclusive possession of the land, the "first location operates as bar to the second."

We do not think that any one would have the assurance to say that the location made by the grantors of the defendants in error was not a location of *mineral land*, and if it is a location of mineral lands which persons had a right to locate under the laws of the United States, then the opinion of the court is conclusive on this point.

Many other decisions by this court can be cited to the same effect, but we do not deem it necessary to take the time of the court to cite them, except on the point as to what is a *mining claim*, as contemplated by the statute.

The court, by Mr. Justice Field, in the case of *The St.*

Louis Smelting and Refining Company vs. Kemp, 104 U. S., 636, 649, in referring to the Starr placer, United States survey No. 255, and which is separated from the ground in controversy in this suit by a common line, says:

> "*A mining claim is a parcel of land containing* "*precious metal in its soil or rock.* * * * If the "miner has only the ground covered by one location, "his 'mining claim' and 'location' are identical "and the two designations may be indiscriminately "used to denote the same thing."

This definition has been approved by the supreme court of Colorado in the case of *Sweet vs. Webber*, 7 Colo., 443.

We call attention to this definition of a mining claim and location to show that this court has made no distinction between classes of mining claims or between placers and lode claims when it says that a valid location having been made it carries with it the exclusive right of possession, and that "mining ground when located becomes the property of the "locators and cannot be relocated until after they have lost, "abandoned, or forfeited their rights."

The United States circuit court for the southern district of California, in the case of *Nevada Sierra Oil Co. vs. Home Oil Co.*, 98 Fed. Rep., p. 673, decided in December, 1899, expressly holds that the law of "possessory rights, giving the locator of a *mining claim* the exclusive right thereto and rendering it no longer public domain, applies to *placer claims*, and on page 677 in the opinion of that court quotes from an opinion of the United States circuit court of appeals in the case of *Erwin vs. Perego*, 93 Fed. Rep., 611, as follows (the clause in parentheses is inserted by the court in the "Nevada Sierra Oil Co." case):

> "The acts of Congress prescribed two, and only "two, prerequisites to the vesting in a competent "locator of the complete possessory title to a lode "mining claim. (*And the same rule is by the statute* "*made applicable to placer mining claims.*) They are

"the discovery upon unappropriated public land of "the United States, within the limits of his claim, of "a mineral-bearing lode, and the distinct marking of "the boundaries of his claim, so that they can be "readily traced. No appropriation of the land is "made until both these requirements are fulfilled, "and until that time the lode and land sought are "open to location and appropriation by any compe- "tent locator; but, when these requirements have "been complied with, the land is *no longer public, but* "*the possession, the right to the possession, and the right* "*to acquire the title are irrevocably vested in the locator.*"

And as the supreme court of California, in the case of *Quigley vs. Gillett*, 101 Cal., 462, says, referring to a placer claim, it being a validly located placer mining claim:

"The ground located became the property of the "locators and could not be relocated until they lost, "abandoned or forfeited their rights to it."

In addition to the above, we find that the statutes of the State of Colorado contain the following, which appears for the first time in the revision of 1868, and now at section 3613 of Mills' Annotated Statutes:

"Any person settled upon any of the public lands "belonging to the United States may maintain tres- "pass *quare clausum fregit*, trespass ejectment, forcible "entry and detainer, unlawful detainer and forcible "detainer, for injuries done to the possession thereof."

Section 3617 of Mills' Annotated Statutes lays down the proposition that any person having any title to occupy a mining claim shall have the right to maintain any action to protect his possession of the same, and the supreme court of Colorado has, in *Armstrong vs. Lower*, 6 Colo., 393, followed the same rule as that adopted by the Supreme Court of the United States, in which case it is said:

"*Only the unoccupied and unappropriated mineral* "*lands of the General Government are subject to explora-* "*tion and location.*"

And further on in the opinion the court says:

> "To perfect a valid location, the prospector must "discover a vein or lode upon the *unoccupied* and *un-* "*appropriated* public domain of the United States."

And in the case of *Omar vs. Soper*, 11 Colo., 380, the court says:

> "It has been repeatedly held that only the unap- "propriated mineral lands of the United States are "open to exploration and location. No one can there- "fore lawfully enter upon the territory so claimed "during the period named, for the purpose of initi- "ating a claim thereto."

In the case of *McFeters vs. Pierson*, 15 Colo., 201, the court quotes, in giving the definition of a mining claim, the language heretofore quoted in the case of *Smelting Company vs. Kemp*, 104 U. S., 648, and says further on in the opinion that—

> "The lands thus located are spoken of as *mining* "*claims* and the locators as the *owners* thereof, antece- "dent to the entry for the Government patent. * * * "He is the owner before as well as after the issuance "of the Government patent, and is entitled to the "*exclusive possession* and enjoyment against every one, "including the United States itself."

Then the court in the last-cited case goes fully into the question, and decides that going upon the possession of one having a valid location of a mining claim is a trespass, and that no new right can be initiated thereon.

In the case of *Girard vs. Carson*, 22 Colo., 345, the same doctrine is laid down by the court in positive language.

The supreme court of the State of Colorado says plainly that provisions relating to "*mining*" claims apply equally to both lode and placer claims. (See the case of *Sweet vs. Webber et al.*, 7 Colo., pp. 443–447–450.) In this case it was confidently contended by counsel that section 2324, United

States Revised Statutes, which relates to the location of "*mining* claims," did not apply to placer claims. The court plainly points out that all provisions relating to "mining" claims apply equally to both lode and placer claims; and the court further points out, on page 449, that there is no difference in the law of "possessory rights" relating to lode claims and placer claims.

In *Stratton vs. Gold Sovereign M. & T. Co.*, 1 Mills' Leg. Adv., 350, complainant brought an action to restrain defendants from extending a tunnel through the claim of the former, which had been located prior to the date of the tunnel site. The defendants answered that they were driving such tunnel for the avowed purpose of discovering and claiming blind veins within the territory of complainant's claims. Complainant applied to Judge Hallett for a temporary injunction, which he granted, and, in the course of his opinion, said:

> "Chapter 6 of the Revised Statutes provides for "three kinds of locations on the public mineral "lands, which, in common speech, are called 'lode "locations,' 'tunnel locations,' and '*placer locations.*' "*When a location* has been properly made *in either* "*class*, and so long as it shall be fully maintained by "use and enjoyment, or by patent, the territory em- "braced in *such location is not subject to adverse lo-* "*cation by a claimant of the same class or any other* "*class*. The reason is that the territory covered by "such location has been severed from the public do- "main, and has become private property, which is no "longer open to a new appropriation."

In addition to the authorities above cited from this court and from the courts of the leading mining States, we wish to quote the opinion of the Commissioner of the General Land Office in the matter of the Zulu lode against the same Searl placer in controversy in the case at bar. The Commissioner states the facts wherein the right to locate a lode within this very placer location is claimed by an outsider so plainly and

shows so clearly that such an act by an outsider is a trespass that we quote his letter to the register and receiver at Leadville, May 31, 1881, in full, as follows:

"GENTLEMEN: On the fifth day of July, 1879, A. D. "Searl filed in your office an application for patent to "the Searl placer claim, designated as survey No. 435, "and gave due notice thereof in the manner pre- "scribed by law, the legal period of notice expiring "September 13, 1879. Prior to the last mentioned "date a number of adverse claims were filed, based "upon the location and discovery of lode claims "within the limits of or partially overlapping the "premises applied for; also, one by A. K. Updegraph, "county judge of Lake county, as trustee on behalf of "settlers for townsite purposes, who claim the same as "the townsite of North Leadville. Suits were com- "menced in pursuance of said adverse claims, and "the proceedings for patent have since remained sus- "pended in your office.

"On the fifth of April, 1881, Edward V. Lowe filed "an application for patent to the Zulu lode, survey "No. 1453, lying wholly within the exterior bound- "aries of the Searl placer, notice of which application "is now being published.

"The Zulu lode claim is based upon a location "made August 23, 1879, at which time the Searl ap- "plication for patent was pending in your office. The "certifiate of location recites that the lode was discov- "ered June 22, 1879.

"Section 2322, U. S. R. S., provides that the locators "of 'all mining locations heretofore made or which "'shall hereafter (from May 10, 1872) be made on any "'mineral vein, lode, or ledge situated on the public "'domain, their heirs and assigns, * * * *shall* "'*have the exclusive right of possession and enjoyment* "'*of all the surface included within the lines of their* "'*location*,' etc.

"Section 2329, R. S., provides that 'claims usually "'called "placers" including all forms of deposit, "'excepting veins of quartz or other rock in place, "'shall be subject to entry and patent under like "'circumstances and conditions, and upon similar

"'proceedings *as are provided for vein or lode claims;*
"'but where the lands have been previously surveyed
"'by the United States, the entry in its exterior
"'limits shall conform to the legal subdivision of
"'the public lands.'

"*The words 'circumstances and conditions' refer to*
"*location and maintenance of possessory title,* etc. One
"of the conditions attached by law to a lode claim
"is that the locator thereof, his heirs and assigns shall
"have exclusive possession of 'all the surface ground
"included within the lines of his location.'

"*The Searl placer, having been duly located, the owner*
"*thereof became entitled to the exclusive right of posses-*
"*sion of 'all of the surface ground included within the*
"*lines of his location.*' Therefore the entry upon
"said placer claim for the discovery of the Zulu
"lode, on the 22d day of June, 1879, was an illegal
"act. A location based upon such discovery is illegal.
"The location being illegal, all subsequent proceed-
"ings for patent are invalid.

"The existence of the Zulu lode within the Searl
"placer, however, is denied by the placer claimant.
"This is a question of fact affecting the rights and
"duties of Mr. Searl, the placer claimant, and should
"be determined by a hearing which you are directed
"to hold giving due notice to all parties in interest.
"The pending application of Mr. Lowe, for patent to
"the Zulu lode being illegal, is hereby dismissed, of
"which you will give due notice to all parties in in-
"terest, and allow sixty days for appeal.

"Very respectfully,
"(Signed) J. A. WILLIAMSON,
"*Commissioner.*"

We desire to call attention to the Commissioner's construction of section 2329, United States Revised Statutes, and to what he says with reference to the words "circumstances and conditions," and we insist that it is the only fair construction that can be put upon those words as they appear in the statute.

It would seem, therefore, that if one makes a valid placer

location in good faith upon the public domain, and thereafter performs the work required by law to hold such location, that he is entitled to all of the lodes which may afterward be discovered therein, unless by some overt act he waives his right to said lodes. The manner in which such waiver may be made is expressly provided by section 2333 of the United States Revised Statutes.

In the case at bar there is no showing or attempt made to show that the Searl placer claimants applied for a patent after the alleged discovery of lodes claimed by plaintiff in error, or that any waiver of any right to any of the lodes in controversy was ever made, because it is not contended and is not the fact, as shown by the record, that any lode was shown to exist or exposed within the placer claim of the defendants in error at the time their original application for patent was made, as hereinbefore set forth.

Opposing counsel assert that the supreme court of Colorado has ruled the case at bar in direct conflict with its former decision in *Mt. Rosa M. M. & L. Co. vs. Palmer*, 20 Colo., 56. In its first decision in this case (R., 69) that court states precisely what it *did* decide in the Mt. Rosa case, and concludes (R., 70):

> "It is obvious that the facts of the case in hand do "not bring it within the principles laid down in the "Mt. Rosa case. If, in the case at bar, the lode claims "were known to exist at the time of the entry of de- "fendant's grantors upon the Searl placer, under the "decision in the Mt. Rosa case the entry was not un- "lawful; but if on the contrary, the veins were then "unknown, by the same decision the right of posses- "sion of this ground belonged to the owners of the "placer location. Their right of possession included "these unknown veins and the entry for prospecting "was a trespass, and no title could thereby be in- "itiated."

In passing upon the petition for rehearing the court in its second opinion said (R., 87):

"The learned counsel for plaintiff in error were "permitted, *amici curiæ*, to file a brief in the Mt. "Rosa case, and we then had the benefit of their "learning and research, and the record in the case at "bar was before us when the opinion was prepared "by Mr. Justice Goddard. It was with full knowl- "edge of the issues herein and as particularly appli- "cable to the argument of this plaintiff in error made "in that case, which is the same as it is here, that the "following language found on page 61 was used :

"'While we recognize to its full extent the rule "'that precludes the initiation of a right through a "'trespass upon the lawful possession of another, we "'think, under the established facts in this case, ap- "'pellant is not in a position to invoke its protec- "'tion. The lodes in question were known to exist "'prior to the application for patent; and appellant, "'not having taken the necessary steps to obtain "'them, they were open to location by others at the "'time they were located by the grantors of appellee. "'In making the locations, no right of appellant was "'invaded, and their validity, therefore, is in no way "'affected by the fact that they were made within "'the surface boundaries of a prior placer location.'

"We then had in mind, as we do now, the distinc- "tion between the facts of that case and the case at "bar. There it was unquestioned that the lode "claims were known to exist within the limits of the "placer location before an application for patent for "the latter was made. In the case at bar, as we have "seen, the findings of fact of the trial court, which "upon this review are conclusive upon us, are that "the lode claims were not known to exist until long "after the application for the placer patent was filed. "The distinction is vital and the rule in the two cases "is different."

Opposing counsel (Brief, 37) insist that in its second opinion the supreme court of Colorado "shifted its ground" and "took refuge behind the abandoned and rejected applications for patent made by the owners of the Searl placer." The court did nothing of the kind and the learned counsel

singularly misapprehended the true meaning and position of the court, as can be readily shown.

Section 2333, United States Revised Statutes, provides:

> "Where the same person, association, or corporation is in possession of a placer claim, and also a vein or lode included within the boundaries thereof, application shall be made for a patent for the placer claim, with the statement that it includes such vein or lode, and in such case a patent shall issue for the placer claim, subject to the provisions of this chapter, including such vein or lode, upon the payment of five dollars per acre for such vein or lode claim, and twenty-five feet of surface on each side thereof. The remainder of the placer claim, or any placer claim not embracing any vein or lode claim, shall be paid for at the rate of two dollars and fifty cents per acre, together with all costs of proceedings; and where a vein or lode, such as is described in section three hundred and eighty-eight, is known to exist within the boundaries of a placer claim, an application for a patent for such placer claim, which does not include an application for the vein or lode claim shall be construed as a conclusive declaration that the claimant of the placer claim has no right of possession of the vein or lode claim; but where the existence of a vein or lode in a placer claim is not known, a patent for the placer claim shall convey all valuable mineral and other deposits within the boundaries thereof."

By section 2333 the failure of the placer claimant to include in his application for patent a "known vein or lode" is held as a "conclusive declaration" that he has no right thereto, and it is hence by operation of law excluded from his placer patent. Now, at the time Searl's original application for patent was made, on July 5, 1878, and again when his amended application for patent was made, on March 10, 1882, *this record affirmatively shows the lode claims here in suit were not so known to exist. Hence they could not be held excluded from his placer claim by reason of the applications then*

made. The fact that his applications for patent were *rejected* does not destroy his right to unknown lodes, nor justify the intrusion of third persons upon his surface ground seeking to find unknown lodes; or, in the language of the court below, "a prospector may not enter upon a prior placer location for the purpose of prospecting for or locating unknown "lodes or veins." Otherwise stated, the failure to include then unknown lodes at the time of Searl's rejected placer applications did not thereafter give the right to a prospector to enter upon his possession to seek to find *unknown* lodes. This is so clearly the meaning of the court that we do not need to discuss that matter further.

In the Mt. Rosa case the supreme court of Colorado said:

> "While we recognize to its full extent the rule that "precludes the initiation of a right through a trespass "upon the lawful possession of another, we think "under the established facts in this case, appellant is "not in a position to invoke this protection."

But in the case at bar defendants in error are in a position to invoke its protection, and always have been, because they never waived any right whatsoever to any pretended lode of plaintiff in error, as the Mt. Rosa placer claimants did. In addition, in the Mt. Rosa case it does not appear from any source but that the lodes that were located within the placer claim protruded from the ground or were exposed at the time of the location of the placer.

In the case at bar (R., 39) it appears that one J. K. Carleton testified that he believed that there was one large mineral-bearing vein which underlaid the whole of said placer, dipping under the same, and that he knew of *evidence* of said vein extending under said placer, from workings in the Lucy B. Hussey and other lodes, as far back as 1881. This is the strongest evidence produced, which the court below evidently did not believe much of, which shows that four years after the location of the placer in question the most

that was known was Carleton's belief that the vein ran underneath the placer.

In *Dahl vs. Raunheim*, 132 U. S., 230, 261, it was expressly held that such lode discovery on adjacent land raised no presumption of the existence of a vein or lode within the placer claim.

It further appears (R., 39) that the witnesses Newell, Doyle, and Carleton testified that said lode or vein had "since 1895" been traced and discovered under the placer, which is the only evidence, as appears in the record, that any vein was ever discovered within the boundaries of the placer claim; and by referring to the record we find that this adverse suit was begun in 1893. But indeed, as far as the record shows, and as far as there was any evidence before the court, no discovery of any lode was ever made by plaintiff in error within the boundaries of the placer claim until 1895, long after this suit was begun and long after their application for a patent. The evidence which we have referred to shows that the attempted locations of the plaintiff in error were made upon the placer claim in question by excavating the wash or placer dirt on the surface of said placer, and in all probability that was one of the grounds for the decision of the court below; and as the evidence is not all preserved in the bill of exceptions, this court will presume that there was evidence sufficient to sustain the findings of the court below, and that any discovery made by the plaintiff in error or its grantor was made by the entry upon the possession of the defendants in error and by digging and excavating the earth within the boundaries of the claim of the defendants in error to which they had the exclusive right of possession; and, if such was the fact, we do not believe that this court will hold that any right could be initiated by such action.

Much stress is laid by opposing counsel upon the decision of Mr. Secretary Smith in *Aurora Lode vs. Bulger Hill* and *Nugget Gulch* Placer, 23 Land Decisions, 95, as supporting their contention. It is most pertinent to note that the cited

case was before this court under the title of *Bennett vs. Harkrader*, 158 U. S., 441, cited *supra*, wherein this court sustained the verdict and judgment below upon the adverse claim suit awarding the placer applicant possession, with resulting preference right of purchase. The effect of that judgment was, however, wholly defeated by the later decision of Secretary Smith upon the theory that the case as so adjudicated did not authorize the successful claimant therein to enter the land as placer ground because of the existence of a known lode, which he did not seek to purchase *as such* under his judgment-roll. We do not find it necessary to discuss that decision *in extenso*, because the court below in its opinion clearly and concisely states its plain meaning and legal effect thus (R., 86):

> "Counsel insists that we have misconstrued the "decisions in the cases of the Aurora lode and the "Mt. Rosa Company, upon which we commented in "the former opinion. We have given attentive con- "sideration to their argument in that behalf, and "after carefully re-reading the opinions are satisfied "that we have not misconceived their effect. In the "syllabus of the Aurora case it is said that the loca- "tion of a mining claim 'does not operate to give "'title or right of possession to veins or lodes within "'its limits, or preclude the right of discovery and "'location thereof by others.' This language seems "to be taken substantially from what is said in the "opinion of the Secretary of the Interior at page 101 "of the official report. The statement, removed "from its proper setting, may be broad enough to "include unknown, as well as known, veins or lodes; "but considered, as it should be, in connection with "the context, it is clear that the Secretary intended "it to apply only to known lodes, for he expressly "says, in speaking of the general rule, if the veins or "lodes were 'not known to exist at that date (*i. e.*, "'when patent for placer claim is applied for), the "'placer patent will carry the title to them.'
>
> "This can mean nothing else than that, if lodes or "veins are not known to exist within the limits of a

"placer location at the time when patent for the
"latter is applied for, they belong to the placer claim-
"ant, and one may not thereafter make an entry
"upon the placer claim for the purpose of discovering
"and locating them. But if the decision of the Sec-
"retary of the Interior in this case can, by any canons
"of construction, be considered authority for the con-
"tention of the plaintiff in error here that a prospec-
"tor may, without restriction, within the limits of a
"prior valid placer claim prospect for, and thereafter
"lawfully locate, lodes not known to exist at the time
"of the application for a placer patent, its binding
"effect would seem to be overcome by the decision of
"the Supreme Court of the United States in *Bennett*
"*vs. Harkrader*, 158 U. S., 441, and in many other
"decisions of that and other courts."

Indeed, our learned friends, in citing cases which are undoubted law, wholly fail to distinguish the *facts* of the case at bar from the basic facts necessarily involved in the cases thus cited. It has been repeatedly held that *known* lodes within placer claims are excepted from placer application and patent unless specifically described and applied for. That is the clear provision and intendment of section 2333. *But* neither the mining statute nor any adjudicated case thereunder has held that lodes *not* known are within the exception or the meaning of the statute. Certainly no case to this writing has held that the possession of the placer claimant may be invaded by strangers for the purpose of delving in the earth to hunt for *unknown* lodes, which *may* underlie the surface and which can only be discovered and made known by such exploitation. *That* is the governing distinction, and we submit the supreme court of Colorado, on the established facts of this case, *has* correctly apprehended the distinction and has also correctly ruled the law thereon.

The *dicta* of Secretary Smith in the Aurora Lode case, if followed to its legitimate results, in many instances would

abrogate the statutes of the United States with reference to the location and ownership of placer claims.

According to such *dicta*, and according to some of the statements of Mr. Lindley in his work, a location of a placer claim can be made upon the public mineral domain of the United States, such as has been made in the case at bar, and on ground adjoining it. The location may contain valuable placer dirt to the depth of several hundred feet, and for anything that is known by the locator at the time of the location no vein or lode of any kind or description be contained therein; but there may be a deposit or lode at a depth beneath the surface of 500 or 600 feet or 200 or 300 feet—at least to such a depth that neither the locator nor the witness Carleton could actually see, because we have heard it frequently stated in connection with mining that no one could actually see into the ground. The placer locator has made his location in good faith, perfected it, and kept up his assessment work, but has not applied for a patent therefor (and no one will contend that it is his duty to ever apply for a patent or that his title becomes any weaker by reason of the fact that he does not apply for or procure a patent. See *Chapman vs. Toy Lung*, 4 Sawyer, page 28; and *Gillis vs. Downey*, C. C. A., 85 Fed., 483). Years afterward, or indeed at any time afterward, developments at some other point lead the general public, or a considerable number of individuals, to believe that underneath the valid placer claim there is such a lode or deposit. Notwithstanding the fact that the placer claimant is entitled to possession, a great army of people go upon his ground and sink shafts fifty feet apart, which, according to Secretary Smith, they have a right to do, until such a depth is gained that the underground lode or deposit is uncovered and disclosed, and locations are made thereon by the trespassers, each fifty feet in width and 1,500 feet in length—the length of the lode claims being the same as the width of the placer claim. Each and all of the locators have sunk through the

placer deposits or placer gravel in initiating his lode right. Each of the trespassers who sinks a shaft is entitled, according to Secretary Smith and Mr. Lindley, to his fifty feet, and each claim side lines with another. The entire surface is covered with such locations, and patents are obtained so that the valid location of the placer claimant and his right of possession and his placer ground has been entirely obliterated, and what all the courts of last resort have declared to be his property is vanished in air. We submit that this is not an overdrawn case of what can or may occur at any time if the erroneous doctrine announced by Secretary Smith and by Mr. Lindley is carried to its legitimate conclusion; and it is neither more nor less than is being attempted to be done in the case at bar by plaintiff in error and its grantors, the only difference being that they claim the locations 300 feet wide, and by them are attempting to obliterate the placer claim that has been found by the court below to be a valid placer claim and to have remained such for more than thirteen years before they entered upon it, and for at least eighteen years before any of the alleged lodes were dis covered or disclosed.

Such being the case, the absurdity of the contention of the plaintiff in error we think appears fully.

So that in the case at bar we have no *res adjudicata*, so declared by the Land Department; so found as a matter of fact by the Land Department; so found as a matter of fact by the courts below, and we have no evidence in the record which shows that any right was or could have been initiated to the ground in controversy by plaintiff in error except by a trespass, and that no waiver of any right to any of the ground in controversy has ever been made by the defendants in error.

In concluding this point, we call the attention of the court to the fact that the record in this case does not set forth the evidence. This court, therefore, will not inquire

whether there was any evidence tending to show that the defendants in error did not have a valid placer location. It is not necessary to review the cases in which this court and all of the appellate courts have uniformly stated that where the record does not present a transcript of *all of the evidence*, the appellate court will presume that the evidence was such as to support the judgment of the court below.

The evidence shown by the record supports the findings and judgment of the court below; no evidence has been shown to support a judgment for plaintiff in error; but were it otherwise, in the absence of a bill of exceptions showing all of the evidence, it must be presumed by this court that there was sufficient evidence to support the judgment of the court below, and the judgment should be affirmed.

III.

RIGHT OF PLACER CLAIMANT TO ADVERSE AN APPLICATION FOR LODE PATENT.

Opposing counsel deny such right, although it was squarely recognized by this court in *Bennett vs. Harkrader*, 158 U. S., 441, and the verdict and judgment below awarding right of possession and consequent right to purchase the fee to the placer claimant affirmed. That case was not thus ruled by any possible misunderstanding or oversight. The precise point was directly raised in that case by the plaintiff in error on the brief of his counsel (p. 8), and under proper assignment of error, thus:

> "The plaintiff was claiming the premises by virtue "of a placer location. The defendants were claim- "ing the same as a lode location; therefore the "plaintiff had no right whatever to this ground as "against any intervening rights which a defendant "may have acquired by virtue of a lode location on "the same ground. So that the material part of this "refused instruction is found in the latter portion

"thereof and correctly embodies the legal principle "involved, namely, that if a lode location had inter- "vened as against a placer location, the lode location "would be the superior title."

Clearly, then, this court has advisedly ruled against the contention here made by plaintiff in error.

But opposing counsel contend that in respect of mineral lands "the lode claim was the standard;" that the placer claimant could adverse only upon the single ground of denial of existence of the lode claim, and of that question, says counsel, the Land Department alone has jurisdiction to inquire. We do not so read the law. This court has not so expounded it. *Contra*, as clearly ruled in *Shoshone Mining Co. vs. Rutter*, 177 U. S., 505, 511, and quoted fully *supra* under the mining law, upon an adverse claim suit "not merely questions of law under the statutes of the United "States, but questions of *fact* and questions arising under "local rules and customs and State statutes are open for "consideration."

Under the mining law (sec. 2326, U. S. R. S.) the question sent to the courts to be there litigated upon the adverse claim suit is "the question of the right of possession." The judgment rendered on *that* question controls the United States Land Department, for "after the decision they are "governed by it."

Richmond Mining Co. vs. Rose, 114 U. S., 576, 585.

If, then, the lode claimant has wrongfully intruded upon the prior placer claimant, certainly such trespass cannot *create* a right. As certainly *that* is matter of adverse claim, and suit for it is of the essence of "the question of the *right* "of possession." As certainly this court has so decided, for the verdict and judgment sustained in *Bennett vs. Harkrader*, *supra*, in favor of the placer adverse claimant involved in its necessary conclusion the finding that the placer claimant

was in rightful possession and had been wrongfully ousted therefrom by the lode-claim applicant.

Notwithstanding the severe criticism indulged by counsel for plaintiff in error against the decisions and judgment of the supreme court of Colorado in the case at bar, we confidently submit that learned court has correctly ruled the law upon the facts established by this record. The views of text writers, however eminent, which are quoted so freely as in asserted contradiction thereof, do not convince us that the court has mistaken the purpose and meaning of Congress. Indeed, running all through the comments of the learned authors thus cited, there is plainly expressed and meant that *known* lodes located and held as such are excepted from the placer location and claim. *Nowhere* is there any suggestion that unknown lodes within placer claims are subject to exploitation and adverse entry by the prospector who cannot know, but hopes only by development beneath the surface to uncover and discover, what is at the moment of his entry an *unknown* lode. Congress did not mean to authorize such trespass, for it could readily appropriate the *whole* of the placer claim, oust the placer claimant, and by subterranean exploitation *discover* what was wholly unknown, wholly hidden from the surface, while the overlying placer deposit may be rich in placer gold.

The contention of counsel that there are degrees or grades of possessory title upon the public mineral domain is not supported by sound reasoning nor by the test of experience. The world's supply of gold in the United States, including Alaska, in South Africa, and elsewhere, has been and is largely furnished by placer mining. It has been and remains the pioneer of gold mining. It precedes the discovery of the mineral in vein or lode deposit. Certainly the law did not intend to offer the placer miner and locator the assurance of exclusive possession and at the same time authorize his possession to be invaded, in whole or in part, by strangers seeking to appropriate against him not *known* lodes (to

which alone section 2333, U. S. R. S. relates), but unknown lodes, hidden deep beneath the surface, and which must by development be uncovered and *discovered*. Such construction of the law would be a reproach.

Counsel ask what the adverse claimant here can get under the prior placer location upon affirmance of this judgment? The inquiry begs the whole case. The question which stands here for judgment is the right of possession. If that has been wrongfully invaded, the trespass cannot ripen into a legal right on the part of this plaintiff in error to appropriate what has been thus wrongfully taken. It is the common law of the land and the especial provision of the mining law as expounded by this court, that a claim initiated in trespass and without right is *void*. Thereunder the wrongdoer can take nothing. What the rightful owner may do is not open to the trespasser to question, nor can it authorize a judgment in his favor. If, as we contend, the plaintiff in error is not entitled to the right of possession, we are entitled to the judgment. What may be done thereafter as between the adverse claimant and the United States is not a matter in which he has any lawful interest or right to inquire.

We submit the judgment of the supreme court of Colorado was right and should be affirmed.

Respectfully submitted.

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